

LAW OFFICES OF DALE K. GALIPO

Dale K. Galipo, Esq. (SBN 144074)
dalekgalipo@yahoo.com
Marcel F. Sincich, Esq. (SBN 319508)
msincich@galipolaw.com
Cooper Alison-Mayne (SBN 343169)

cmayne@galipolaw.com
21800 Burbank Blvd., Suite 310
Woodland Hills, CA 91367
Tel: (818) 347-3333 | Fax: (818) 347-4118

MARDIROSIAN & MARDIROSIAN, PLC

Margarit K. Mardirosian, Esq. (SBN 201885)
mkm@mardirosianlaw.com
1155 North Central Avenue, Suite 201
Glendale, CA 92102
Tel. (818) 244-8166 | Fax (818) 244-0796

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ANGELINA ATABEKOVA-
MICHAELIDIS, and VARDUI
MICHAELIDOU; both individually and
as successors in interest to Decedent
MELKON MICHAELIDIS,

Plaintiffs,

v.

CITY OF LOS ANGELES; and
BRYAN MORALES,

Defendants.

Case No. 2:22-cv-05620-MCS-MAA

[*Honorable Mark C. Scarsi*]

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION *IN*
LIMINE NO. 4 TO EXCLUDE
EXPERT OPINION TESTIMONY
WHICH IS WITHOUT
FOUNDATION OR EVIDENTIARY
SUPPORT BY PLAINTIFFS'
EXPERT ROGER CLARK**

PTC & Hearing on Motions *in Limine*:

Date: October 16, 2023

Time: 2:00 p.m.

Jury Trial

Date: October 31, 2023

Time: 08:30 a.m.

Ctrm: 7C

350 West 1st Street, 7th Floor
Los Angeles, California 90012

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action arises from the unreasonable use of deadly force against decedent Melkon Michaelidis by Defendant Bryan Morales. Eight officers created a firing line, standing behind cover, and pointing various weapons at decedent, who was suffering from a mental health crisis. As the decedent slowly walked from over 22 feet away, he was shot by a 40mm projectile followed by a beanbag shotgun round. Both less-lethal rounds were effective. As the decedent was falling to the ground, without warning, Morales fired two lethal rounds, killing decedent.

Plaintiffs' police practices expert, Roger Clark, concluded that Morales' use of force was inappropriate and unnecessary under the circumstances, and violated basic Peace Officer Standards and Training (POST) standards. These conclusions are well within Mr. Clark's area of expertise. Defendant now moves to limit Mr. Clark's testimony; specifically, Defendant moves to exclude opinions that they argue: (1) are not supported by Mr. Clark's expertise, (2) opine on the ultimate issue, or (3) lack evidentiary support. Plaintiffs respond to each argument below.

II. LEGAL STANDARD

The gatekeeping requirement of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is to ensure the reliability and relevancy of expert testimony; "employ[ing] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). The Court must assess (1) the expert's qualification to present the opinions offered, (2) "whether the reasoning or methodology underlying the testimony is scientifically valid," and (3) "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93. In analyzing whether an expert's testimony is admissible, courts consider whether the expert's testimony is relevant (helpful to the jury) and reliable. *Id.* at 589, 591-92. When assessing an expert's qualification to present the opinions

1 offered, courts look to the Federal Rules of Civil Procedure, Rule 702 and Federal
2 Rules of Evidence, Rule 703. *Id.* at 592.

3 Rule 702 provides, in relevant part, that an expert qualified by knowledge,
4 training or experience may testify as to opinions if (a) within the experts specialized
5 knowledge and helpful to the jury, (b) based on sufficient facts, (c) the product o
6 reliable principles and methods, and (d) reliability applies those principles and
7 methods to this matter. Pursuant to Rule 703, an expert may base an opinion on facts
8 in the case that the expert has been made aware of.

9 Although expert opinions must be reliable, a trial judge has the discretion
10 “both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the
11 reliability of an expert’s methods is properly taken for granted.” *Kumho Tire Co.,*
12 *Ltd.*, 526 U.S. at 152. Defendant cannot use this standard to exclude an expert’s
13 opinions just because they disagree with the expert or the opinions are unfavorable to
14 his position; instead, “[v]igorous cross-examination, presentation of contrary
15 evidence, and careful instruction on the burden of proof are the traditional and
16 appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at
17 595. Defendant’s “recourse is not exclusion of the testimony, but, rather, refutation of
18 it by cross-examination and by the testimony of [their] own expert witnesses.”
19 *Humetrix v. Gemplus*, 268 F.3d 910, 919 (9th Cir. 2001). Indeed, Defendant has
20 retained his own police practices expert and intends to proffer expert testimony that
21 “Officer Morales’s use of lethal force was objectively reasonable....” (Exh. A,
22 Sanchez Report at 19.)

23 **III. ARGUMENT**

24 As an initial matter, Mr. Clark’s qualification as an expert is based on more
25 than sufficient knowledge, skill, experience, training, and education in the field of
26 police practices. Mr. Clark has over 50 years of experience, including 27 years in the
27 Los Angeles County Sheriff’s Department where he underwent a plethora of
28 pertinent training courses and 23 years as a Police Procedures Consultant where he

1 continued his education and training. Mr. Clark is a POST Command College
 2 graduate, has a POST Management Certificate, and Advanced POST Certification.
 3 Mr. Clark was a field training officer while assigned as a patrol deputy and trained
 4 new officers in POST and department approved patrol procedures, field
 5 investigations, apprehension techniques, and emergency procedures. As a Sergeant
 6 and as a Lieutenant, Mr. Clark served on the training staff of the LASD's Patrol
 7 School which taught the POST accepted patrol tactics, investigation, and
 8 apprehension methods.

9 Furthermore, Mr. Clark has consulted on over a thousand cases regarding use
 10 of force and police practices. Mr. Clark has been recognized as an expert in police
 11 practices and cited approvingly in judicial decisions on numerous occasions,
 12 including by the Ninth Circuit. *See, e.g., Blankenhorn v. City of Orange*, 485 F.3d
 13 463, 485 (9th Cir. 2007) (Mr. Clark's expert report was quoted approvingly by the
 14 United States Court of Appeals for the Ninth Circuit as an expert in Police
 15 Administration, Discipline and Use of Force, wherein the court noted that Mr. Clark
 16 is a former sergeant and lieutenant with twenty-seven years of experience in the Los
 17 Angeles County Sheriff's Department); *Torres, v. City of Los Angeles*, 540 F.3d
 18 1031, 1042-43 (9th Cir. 2008); *Nelson v. City of Davis*, 685 F.3d 867, 879 (9th Cir.
 19 2012); *A. K. H by and through Landeros v. City of Tustin*, 837 F.3d 1005, 1012 (9th
 20 Cir. 2016); *see also Lopez v. Chula Vista Police Dept.*, 2010 WL 685014, at *5 (S.D.
 21 Cal. Feb. 28, 2010) ("Based upon Clark's report and the submissions of the parties,
 22 the Court concludes that Clark's opinions are sufficiently relevant and reliable to
 23 meet the standard of Rule 702."). Defendant, unable to assail Mr. Clark's credentials
 24 as a police practices expert, attempt to challenge his individual opinions on various
 25 grounds. None of his arguments have merit.

26 **A. Roger Clark's Expertise Supports His Opinions**

27 Defendant takes issue with several opinions—or categories of opinions—that
 28 he claims fall outside of Mr. Clark's expertise. Defendant challenges Mr. Clark's

1 opinions on the physical effects of the less lethal munitions that struck Michaelidis.
2 Defendant argues that this falls outside the scope of Mr. Clark's expertise and that
3 there is "no physical evidence in the record that the less lethal munitions had any
4 effect on Michaelidis." (Doc. 77 at 7-8.) Defendant also challenges Mr. Clark's
5 opinions regarding the bullet trajectories and how Michaelidis body was position at
6 each shot, arguing that these opinions require a ballistics expert, not a police practices
7 expert. (Doc. 77 at 8-9.)

8 Neither of these arguments have merit. Mr. Clark is not performing a complex
9 analysis of Michaelidis's body position or a reconstruction of bullet trajectories. He is
10 merely describing what he sees in the video of the incident so that he can opine as to
11 what a reasonable officer would do under the circumstances. Mr. Clark's review of
12 the evidence in this case is consistent with his years of training as a police officer, as
13 a detective, and as a lieutenant, and general police practices, which include evidence
14 construction and crime scene analysis. Mr. Clarks opinion is informed by the critical
15 facts as shown in the video footage of the incident, including the decedent's body
16 position at the time each of the shots were fired and whether he was falling to the
17 ground or turning his back to Defendant. If Mr. Clark is informed of such facts based
18 on the evidence available, he is entitled to opine as to the significance of the body
19 position at the time of the shooting.

20 Defendant argues that Mr. Clark should not be allowed to testify regarding his
21 opinion that Michaelidis was showing signs of mental illness. (Doc. 77 at 10-11.)
22 Defendant argues that Mr. Clark is offering an expert medical testimony or expert
23 mental health testimony. However, Mr. Clark is merely offering his opinion as to
24 how a reasonable would have responded to Michaelidis, given his behavior as
25 observed in the video and known to Morales, such as Michaelidis cutting himself
26 with the blade of a knife the blade. Mr. Clark is well within his bounds as a police
27 practices expert to comment on how, based on his experience as a twenty-seven-year
28 veteran of the LASD, and POST 37 training specifically dedicated to officers

1 identifying persons with potential disabilities, with the intent that a reasonable officer
 2 would respond to a person showing such obvious signs of a mental health crisis with
 3 particular de-escalation tactics. Mr. Clark is permitted to testify regarding the
 4 training, standards, and policies which officers are expected to follow and factors
 5 they should take into consideration when confronted with the circumstances that were
 6 before them. If, based on his experience and training, Mr. Clark believes that a
 7 reasonably trained officer would consider that a suspect who is cutting himself and
 8 holding a knife by the blade as he sways side to side for several minutes might be
 9 suffering from a mental health crisis, and treat the suspect accordingly, then Mr.
 10 Clark should be permitted to so testify. Further, an element of consideration as to
 11 whether an officer should have used deadly force is “whether it should have been
 12 apparent to the officer that the person he used force against was emotionally
 13 disturbed.” Ninth Circuit Model Jury Instructions, No. 9.25. Mr. Clark should be
 14 permitted not only to explain his opinions as to whether a reasonable officer would
 15 have considered Michaelidis to be emotionally disturbed, but also what that means to
 16 an officer based on basic police training and standards. None of Mr. Clark’s opinions
 17 require formal medical training—yet all are helpful to the jury. He is merely applying
 18 his professional opinion to the facts of this case. The impression of mental illness that
 19 Michaelidis would convey to a reasonable officer at the scene is essential to a use of
 20 force reasonable analysis and should not be excised from Mr. Clark’s analysis.

21 Defendant cites *Menjivar v. City of Los Angeles*, 2007 WL 4662062, at *6 n.54
 22 (C.D. Cal. July 24, 2007), but that case favors the Plaintiffs rather than Defendant.
 23 First, the *Menjivar* court only held that Mr. Clark’s “opinion regarding the location of
 24 the *bullet casings* found at the scene” (emphasis added) did not meet the *Daubert*
 25 standard, but bullet casings are not at issue here. *Id.* Second, Defendant fails to
 26 mention that **the court went on to allow Clark’s “opinion that [the victim] was**
 27 **shot while turned away and running from [the shooter].”** *Id.* The court noted that
 28 Mr. Clark’s opinion was adequately supported by his “review of the shooting scene,

1 the bullet trajectories reflected in the autopsy report, and the testimony of [the
 2 shooter] and [a witness], which forms the basis for his opinion that Lopez was shot
 3 while turned away and running from Hernandez. This opinion, therefore, is properly
 4 considered in deciding defendants' motion." *Id.* Here, as in *Menjivar*, Mr. Clark's
 5 opinion that Michaelidis was shot in the back is not based on shell casings, ballistics,
 6 or forensic biomechanics. He is basing his opinion on a video that shows the events,
 7 along with an autopsy, both of which are typical categories of evidence relied upon
 8 by experts in his field, which are also relied upon by Defendant's expert Mr.
 9 Sanchez. Thus, his opinions should be admitted.

10 Similarly, in the two other cases cited by Defendant, Mr. Clark did not have
 11 the benefit of a video as he does in this case, so he made inferences about body
 12 position based on his trajectory analysis. In *Speer v. County of San Bernardino*, 2021
 13 WL 4459680 (C.D. Cal. July 9, 2021), he was attempting to infer the position of
 14 shooter and victim based on the entry wound and direction as recorded in the
 15 autopsy. *Id.* at at *2; *see also Sanchez v. Jiles*, No. CV1009384MMMOPX, 2012 WL
 16 13005996, at *8 (C.D. Cal. June 14, 2012) (Mr. Clark inferring body position based
 17 solely on autopsy report). But unlike these cases, here, *there is a video*. Mr. Clark
 18 need not rely on any expertise in trajectory analysis to form his opinions, he merely
 19 analyzed the video of the event and based his opinion on what he sees, along with the
 20 results of the autopsy report. As noted in *Sanchez* and *Menjivar*, courts have
 21 "previously observed that Clark is qualified to testify as an expert on shooting scene
 22 reconstruction and investigative procedures." *Sanchez*, 2012 WL 13005996, at *9
 23 (citing *Menjivar*, 2007 WL 4662062 at *6 n. 54).

24 For these reasons, Mr. Clark's opinions should not be excluded because they
 25 fall well within his expertise.

26 **B. Ultimate Issue Opinions Should Be Applied Equally To Both Parties**

27 The Court should reject Defendant's attempt to label Mr. Clark's opinions as
 28 legal conclusions. (Doc. 77 at 11-13.) Mr. Clark is not making a legal conclusion, he

1 uses terms that may overlap with legal terms, such as “inappropriate,” “unnecessary,”
2 and “excessive and unreasonable”, but he uses these terms “as defined by POST and
3 officer training.” (Doc. 77 at 40 (excerpt from Mr. Clark’s expert report))

4 “Expert testimony on police practices and the use of force has generally been
5 found to be admissible in cases involving allegations of police misconduct.” *Lopez*,
6 2010 WL 685014, at *1; *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005)
7 (en banc) (“Discussing whether the officers’ conduct comported with law
8 enforcement standards, the expert relied upon California’s Peace Officer Standards
9 and Training.... A rational jury could rely upon such evidence in assessing whether
10 the officers’ use of force was unreasonable.”); *Larez v. City of Los Angeles*, 946 F.2d
11 630, 635 (9th Cir. 1991) (finding that testimony of “an expert on proper police
12 procedures and policies” was relevant and admissible); *Davis v. Mason County*, 927
13 F.2d 1473, 1484-85 (9th Cir. 1991) (testimony of plaintiffs’ police practices expert
14 that officers violated law enforcement standards properly received).

15 Courts have routinely held that police experts, specifically Mr. Clark, “can
16 permissibly testify about whether [an officer’s] conduct comported with applicable
17 procedures and policies on the day of the incident, which does not constitute a legal
18 opinion or conclusion.” *Godinez*, 2018 WL 2018048, at *6; see also *Smith*, 394 F.3d
19 at 703 (9th Cir. 2005).

20 Thus, this portion of Defendant’s motion should be denied. However, should
21 the court find that certain opinions do stray into the territory of legal conclusions,
22 Plaintiffs have no objection to both police practices experts refraining from giving
23 ultimate issue or legal opinions. (See generally, Exh. A, Sanchez Report, regarding
24 legal conclusions and ultimate issues opinions at 16-26.) However, Mr. Clark should
25 be allowed to testify as to the training and POST standards regarding the use of force
26 and tactics, as trained to law enforcement officers, and whether any of these uses of
27 force were appropriate based on the POST standards.

28

C. Roger Clark's Opinions Are Supported By The Evidence

Finally, Defendant challenges several of Mr. Clark's opinions that he claims are based on "pure speculation." (Doc. 77 at 13.) Defendant takes issue with Mr. Clark's discussion of the following issues: (1) whether Michaelidis was attempting to flee; (2) Michaelidis's intentions during the incident; (3) the effects of less lethal munitions on Michaelidis; and (4) what Morales knew regarding the other officer's use of force prior to shooting. (*Id.*) Defendant argues that Mr. Clark should not be allowed to testify in a way that "attempts to establish disputed facts" or opines on the subjective intentions of others. (*Id.*) Unfortunately, Defendant does not make any arguments to support the above propositions. Plaintiffs (and the Court) are left to construct an argument for Defendant based on Defendant's string citation to seven (7) pages of Mr. Clark's report and eight (8) pages of his deposition.

First, it is not speculation when Mr. Clark opines that Michaelidis is not attempting to flee. Based on his experience as a twenty-seven-year veteran of the LASD, Mr. Clark gives the unremarkable opinion that Michaelidis is not attempting to flee because the video shows that he does not flee. Similarly, Mr. Clark's opinion that the less lethal munitions appeared to be effective is not speculation. Rather, it is the judgement of Mr. Clark, based on his experience, that when an individual is hit with some force followed by their arms and legs collapsing into their body where the impact occurred, and an individual stops advancing and begins falling to the ground after being hit by non-lethal munitions, a reasonable officer would believe that the non-lethal munitions were likely effective.

Defendant's second and fourth propositions are best addressed together. Mr. Clark does not opine as to Michaelidis's intentions or speculate regarding Defendant Morales's subjective knowledge. None of the pages cited by Defendant support that proposition. Mr. Clark does not intend to offer any opinions as to the subjective intentions of Morales or Michaelidis. Mr. Clark's opinions are based solely on the

1 available evidence, the statements of the officers, and Michaelidis's objective and
2 visible behavior as seen in the video.

3 Based on his arguments discussed above, Defendant goes so far as to argue
4 that Mr. Clark's opinion that Michaelidis was not an imminent threat should be
5 excluded entirely because it is based on speculation. (*Id.* at 14.) Even in the case that
6 portions of an expert's opinion are based on a piece of unreliable information or a
7 bad inference, that does not justify excluding their testimony. That is precisely what
8 cross examination is for. The Defendant will have an opportunity to fully develop the
9 arguments it hinted at in this brief during cross examination.

10 Lastly, Plaintiffs lists five excerpts from Mr. Clark's report and claims, *without*
11 *any argument*, that these statements are "misstatements of and his own interpretations
12 of the applicable federal and state law to support his opinion." (*Id.* at 14.) Plaintiffs
13 are at a loss, as the statements are non-controversial statements about POST
14 standards and training and do not purport to represent legal standards.

15 Thus, this portion of the Defendant's motion should be denied.

16 **IV. CONCLUSION**

17 For the foregoing reasons, Plaintiffs respectfully request that this Court deny
18 Defendant's Motion *in Limine* No. 4 (Doc. No. 77) in its entirety. For each of the
19 reasons set forth above, this Court should find Mr. Clark's testimony on proper police
20 procedures and policies is appropriate in this case. Defendant has not established a
21 sufficient basis for excluding any of Mr. Clark's opinions.

22
23 Respectfully submitted,

24 DATED: October 2, 2023

LAW OFFICES OF DALE K. GALIPO

26 Bv /s/ Cooper Alison-Mayne
27 Dale K. Galipo
28 Marcel F. Sincich
Cooper Alison-Mayne
Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiffs ANGELINA ATABEKOVA-MICHAELIDIS and VARDOUI MICHAELIDOU certifies that this brief contains 3,016 words, which complies with the word limit of L.R. 11-6.1.

DATED: October 2, 2023

**LAW OFFICES OF DALE K. GALIPO
MARDIROSIAN & MARDIROSIAN, PLC**

By: /s/ Cooper Alison-Mayne

Dale K. Galipo
Marcel F. Sincich
Cooper Alison-Mayne
Margarit K. Mardirosian
Attorneys for Plaintiffs